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No. 188

In the

Supreme Court of the United States

OCTOBER TERM, 1958

GLENN HUBBARD HURST and EMPLOYERS CASUALTY COMPANY, INTERVENER,
Petitioners,

v.

GULF OIL CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals (Appendix "A" of Petition) are reported at *251 F. 2d 836*, and *254 F. 2d 287*.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1.

Whether Texas authorities govern the decision in this case.

2.

Whether the Court of Appeals applied the applicable rules of substantive law to the case in reaching the conclusion that Respondent owed Petitioner no duty that might have been breached.

3.

Whether Petitioner's rights under the Seventh Amendment to the Constitution of the United States have been violated.

4.

Whether the Court of Appeals ruled that the trial court erred in its instructions to the jury.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States (Seventh Amendment thereto) and the statute involved, the *Rule of Decision Act (28 U. S. C., Section 1652)*, are set forth in the petition, at pages 15 and 16.

STATEMENT

Without Dispute:

Respondent, the owner of the oil and gas lease in New Mexico covering "flat bald prairie" (R. 303, 34), entered into a drilling contract with Southeastern Drilling Company (R. 247) which called for the drilling and completion on said lease by Southeastern Drilling Company of an oil and gas well.

The written drilling contract particularly provided that Southeastern Drilling Company, as an independent contractor, would furnish the labor, the derrick, a complete rotary drilling outfit, and all "swabbing equipment", including swab unit, swab line, and swab (Par. M 1, R. 252). In Par. 13 of the contract (R. 249), Southeastern Drilling Company agreed to swab the well. It was while this agreed swabbing operation was being conducted by Southeastern Drilling Company that the accident happened.

In the contract, Southeastern Drilling Company was granted the sole authority to direct and control the performance of the work (R. 250). Respondent retained no right of supervision or control as to the details of the work. The work was actually being performed under Southeastern Drilling Company's supervision and control (R. 36) with none of Respondent's men being present when accident happened (R. 79, 329).

When swabbing was first requested, Southeastern Drilling Company hired a swabbing contractor to do the job (R. 259), but after a few days Southeastern Drilling Com-

pany decided to do the job themselves on their draw works (R. 259, 260).

The Oil Well 96 draw works used by Southeastern Drilling Company on its rig was engineered and designed so that swabbing operations could be conducted therefrom (R. 260) and had been deliberately purchased by Southeastern Drilling Company for this purpose (R. 262). Besides Oil Well (U. S. Steel), several other large manufacturers equipped their manufactured draw works in this manner with swabbing devices (R. 332). There was nothing unusual in this method and manner of swabbing (R. 332, 333).

About eight days before the accident, Southeastern Drilling Company had bought the wire line being used (R. 266), put it on its drum in the draw works, ran it through its sheave in the derrick, and commenced work (R. 305). Southeastern Drilling Company's driller, Mr. Boyte, had hung the sheave with which Petitioner finds fault (R. 306). He also directed the spooling of the new wire line, was conducting operations when accident happened, and directed Petitioner to be where he was (R. 307, 311, 313). Southeastern Drilling Company had spliced the line because a kink came in it, but the place of splicing and actual splicing had nothing to do with the accident (R. 317). Petitioner, Southeastern Drilling Company's derrick man (R. 21), was injured while spooling the line. Southeastern Drilling Company's driller, Mr. Boyte, had just pulled "four or five hundred feet of stretch before the line broke" (R. 312) and came down hitting Petitioner and knocking him unconscious

(R. 24). The swab was then 9400 feet in the hole (R. 312). Swabbing is routine common work in oil well completions (R. 270).

No Gulf employee was present when accident happened (R. 39, 63, 79, 328, 329). No Gulf representative had attempted to direct the performance of the work (R. 36, 41, 428). It was stipulated that no Gulf equipment was involved (R. 397).

At the conclusion of all of the evidence, the trial court denied Respondent motion for directed verdict (R. 430) and submitted the case to the jury which rendered their verdict for Respondent (R. 457). The court entered judgment for Respondent not only on the verdict but also on defendant's motion for judgment based upon the reasons and grounds which had been stated in its motion for a directed verdict (R. 463, 465).

ARGUMENT

The Trial Court and Court of Appeals Properly Applied Texas Authorities in Deciding This Case

It was only after the Court of Appeals had affirmed the judgment of the trial court, and in his motion for rehearing, that Petitioner suggested that the law, as set forth in the decisions in the State in which the trial was conducted, cannot properly be applied in this case.

In his complaint, Petitioner made no effort to suggest that the laws of New Mexico governed, nor did he attempt to allege what the law of New Mexico on the subject is.

Likewise, he did not even suggest that the law of New Mexico on the subject is different from the law of Texas, i.e., the law of the forum (R. 1-6). Again at trial Petitioner made no attempt to prove the law of New Mexico or suggest that the court take judicial notice thereof, nor did he infer that the law of New Mexico was different from the law of Texas. In fact, Petitioner's counsel at trial stated:

> "What I wanted to agree with you was that the law of New Mexico is the same as the law of Texas and let it go at that," (R. 241.)

In its reply brief in the Court of Appeals, Respondent cited this passage as a stipulation that Texas law controlled the case. Petitioner did not challenge the effect of the conclusions and proceeded to argue Texas cases as controlling, just as he has in this court (see the Petition and the opinion of Court of Appeals on rehearing, pp. 41-43 of the Petition in this court).

It is also to be noted that Petitioner has yet to point out any difference in the law of New Mexico and the law of Texas on the subject.

Inasmuch as everyone, including Petitioner, until affirmance of this case by the Court of Appeals, assumed that the law as decided by Texas courts governed the action, the situation is identical to that in *Krasnow v. Nat'l. Airlines, Inc. (C. A. 2, 1955), 228 F. 2d 326.* In that case the court held that the conflict of law rules of the forum governed the action, citing *Klaxon Co. v. Stentor Electric Mfg. Co., Inc., 313 U. S. 487, 85 L. Ed. 1977;* that under the conflict of law rules of the forum, the courts of the forum state are

not required to take judicial notice of foreign law when counsel had not indicated at trial that such foreign law governs; and if the content of that foreign law is not pointed out or judicially noted by the trial court, the presumption is that the law of the foreign State is the same as that of the forum State.

The Texas conflicts of law rules are identical to those as set forth in the *Krasnow* case. *Kansas City Title Ins. Co. v. Butler (Tex. Civ. App., 1954), 265 S. W. 2d 154, error ref., n.r.e.; Milner v. Schaefer (Tex. Civ. App., 1948), 211 S. W. 2d 600, error ref.; John Hancock Mutual Life Ins. Co. v. Stanly (Tex. Civ. App., 1948), 215 S. W. 2d 416, 423, no writ history; Lamb v. Hardy (Tex. Sup. Ct., 1919), 211 S. W. 445; Gil v. Evenan (Tex. Sup. Ct., 1900), 59 S. W. 531.*

Thus it is to be seen that the Court of Appeals properly applied Texas decisions in deciding this case.

The Court of Appeals Correctly Applied the Applicable Rules of Substantive Law in Reaching the Conclusion that Respondent Owed No Duty that Might Have Been Breached in This Case

This proposition is aside from the face that the jury by its verdict acquitted Respondent of the actual breach of any duty.

At the outset, it is also to be noted that at page 12 of the Petition, Petitioner, in quoting the opinion of the Court of

Appeals, adds a parenthetical remark of his own which is not borne out by the evidence. Nothing in the records shows or suggests that Glenn Stach was on the job at the drill site most of the time or lived at the drill site, but rather that he went out to the rig about twice a day to pick up the driller's report and observe the progress being made (R. 374). Likewise, the evidence on the effect of kinks in the wire line only had to do with an unrepaired kinked line. In this case the only evidence concerned a kink which had been taken out and the line spliced back together (R. 356). The break in the line did not occur in the spliced portion of the line (R. 317).

In this case, the only thing furnished by Respondent to Southeastern Drilling Company and its employees, including Petitioner, was a piece of "flat bald prairie" (R. 303, 34). The dangerous condition, if any, involved in accident was the wire line and equipment used in connection therewith, all of which were furnished, owned and operated by Southeastern Drilling Company (R. 266).

No Gulf equipment was involved (R. 397).

No Gulf man was present when the accident happened (R. 329). Gulf had made no attempt to direct how the work was to be performed (R. 173, 56, 174). To use the words of Southeastern Drilling Company's tool pusher: "they just told us they wanted the well swabbed, and it was up to us to get the well swabbed" (R. 176).

It is difficult to determine the errors urged by Petitioner in this court. In his statement of the case, Petitioner seems

to urge error in the handling of the matter of discovered peril, and in the holding of the lower courts that the doctrine of "inherently dangerous work" does not enure to the benefit of an employee of the independent contractor hired to perform such inherently dangerous work. In the reasons for granting the writ portion of his Petition, Petitioner complains of the no duty holding of the Court of Appeals.

The Doctrine of Discovered Peril Cannot Apply

The doctrine of discovered peril can have no application in this case for several reasons. In the first place, for the doctrine to have application, the plaintiff must show the conduct of the person sought to be charged approaches that of a deliberate and intentional wrongdoing. *Sugarland Industries v. Daily (Tex. Sup. Ct., 1940), 143 S. W. 2d 931.* There is nothing in this case suggesting any such conduct on the part of Gulf or its employees. Secondly, the doctrine of discovered peril is not applicable "in a situation like that here presented, where the injured person was not in danger from, and not touched by, any vehicle or instrumentality controlled by the defendant sought to be charged under the doctrine." *Elder v. Panhandle Stages Shuttle Service (Tex. Sup. Ct., 1946), 193 S. W. 2d 170.* In this case the rig, all of the men, and all of the equipment involved were under the control of Southeastern Drilling Company, and not Respondent (R. 397, 176). Third, one of the essential elements of the doctrine is the actual discovery by defendants of the plaintiff's perilous position in time to have averted injury to him by the use of all of the means at their command.

It is not enough that the defendant's agents might have acquired such knowledge. *Turner v. Texas Company (Tex. Com. App., 1942), 159 S. W. 2d 112.* In this case, it is undisputed that Mr. Stach, the only agent of Respondent who was ever shown to have been around the well, never saw the man in the "perilous" situation (R. 354). Fourth, there is no showing that Stach had anything at his command with which to avoid the accident. Petitioner was an employee of Southeastern Drilling Company, and Southeastern Drilling Company was doing and had control of all of the work, rig, men, and equipment. Gulf and its agent, Mr. Stach, had only the privilege to look on to see that the end results were obtained, and had no right of control over the operations, the rig, the men, or any part thereof (Contract, R. 247-255). Lastly, if Respondent had the right to control this work so as to avoid the accident, then Petitioner would be barred under the provisions of the Workmens' Compensation Act because such control would have made Petitioner a special employee of Respondent (Stipulation 241). *Standard Ins. Co. v. McKee (Tex. Sup. Ct., 1947), 205 S. W. 2d 362, 363, 364.*

The Doctrine of Inherently Dangerous Work Does Not Enure to the Benefit of Employees of Independent Contractors Engaged in Doing the Inherently Dangerous Work

Actually, the work here involved probably is not "inherently dangerous work" as that term is contemplated by the doctrine of "inherently dangerous work." See *Restate-*

ment of Torts, Section 427a and *Roosth & Genecov Production Company v. White (Tex. Sup. Ct., 1953), 262 S. W. 2d 99, 102.*

Even if it were inherently dangerous work, however, it is plain that Petitioner is not a person to whom the benefit of the doctrine extends. He is not a member of the general public, that is, he, being an employee of the independent contractor engaged in doing the "inherently dangerous work", is not a third person to whom a contractee of an independent contract is liable for damages arising out of the performance of "inherently dangerous work." *Humble v. Bell (Tex. Civ. App., 1943), 180 S. W. 2d 970, error refused for want of merit, 181 S. W. 2d 569; Cagle v. McQueen (C. A. 5, 1953), 200 F. 2d 186; Nance Exploration Co. v. Texas Employers' Insurance Ass'n. (Tex. Civ. App., 1957), 305 S. W. 2d 621, 627, error ref., n.r.e.,* rehearing on application for writ of error denied July 23, 1958.

Respondent Owed Petitioner No Duty in This Case Which Might Have Been Breached

Inasmuch as Gulf had delivered possession and control of the premises to Southeastern Drilling Company under the drilling contract, (R. 247-253), and inasmuch as Gulf had not actually had or tried to assume possession or control of the premises or the equipment placed thereon by Southeastern Drilling Company, including the equipment involved in accident (R. 36, 41, 328), the duties of the owner or occupier of land devolved upon Southeastern Drilling Company and not Respondent. *Restatement of Torts, Section 354.*

Additionally, in this case, no claim has been made in this case that the piece of "flat bald prairie" (R. 303, 34) was not safe. See *Holt v. Texas New Mexico Pipe Line Company (C. A. 5, 45), 145 F. 2d 862.* The dangers involved or claimed arose only from the manner in which the work controlled and directed by Southeastern Drilling Company was performed. These being transitory dangers arising from the manner in which the work was performed, it is quite clear that no legal duty devolved upon Respondent to see that the work was done safely. This was the duty of Southeastern Drilling Company, Petitioner's employer, and not Respondent. *Moore v. The Texas Company (Tex. Civ. App., 1956), 299 S. W. 2d 401, error ref., n.r.e.; Union Tank & Supply Company v. Kelly (C. A. 5, 1948), 167 F. 2d 811; Nance Exploration Company v. Texas Employers' Insurance Ass'n. (Tex. Civ. App., 1957), 305 S. W. 2d 621, 627, error ref., n.r.e.*

There is No Conflict in the Decisions

At page 16 of his Petition, Petitioner says the decision below conflicts with the decision in *McKee v. Patterson (Tex. Sup. Ct., 1954), 271 S. W. 2d 391.* At page 21 of the Petition, he says that the decision in the case conflicts with ten other cases. At page 23, Petitioner says a California case is squarely in point, and at page 24 he says the decision conflicts with a Second Circuit case from New York. These statements are not true.

In *McKee v. Patterson (Tex. Sup. Ct., 1954), 271 S. W. 2d 391,* the court reversed and rendered judgment for the

defendant general contractor, holding that the dangers there involved, as a matter of law, were open and obvious to the plaintiff and that, accordingly, the general contractor who controlled the premises and operations owed no duty to the plaintiff, either to provide a safe place to work or to warn of dangers. Here Southeastern Drilling Company controlled the premises and operations involved and not Respondent.

In *Gulf Oil Corporation v. Wright (C. A. 5, 1956), 236 F. 2d 46,* Gulf was performing the functions it had reserved unto itself under its contract, which functions resulted in the death involved. Here, Southeastern Drilling Company was performing and controlling the operations and instrumentalities involved in accident, and not Respondent.

In *Sun Oil Company v. Pierce (C. A. 5, 1955), 224 F. 2d 580,* the defendant was in control of the drilling rig, directing and controlling the operations thereon. Here, Southeastern Drilling Company was in control of the drilling rig and directing the operations thereon.

In *United Production Corporation v. Chessir (C. A. 5, 1939), 107 F. 2d 850,* the defendant was in possession of and was operating the defectively equipped drilling rig involved. Here, Southeastern Drilling Company, and not Respondent, was in possession of and operating the rig, and furnishing the defective equipment.

In *Amacker v. Skelly Oil Company (C. A. 5, 1943), 132 F. 2d 431,* the defendant possessed and controlled the storage tank involved, and directed the act which brought about

injuries. Here, Southeastern Drilling Company, and not Respondent, was possessed of and controlled the properties involved in accident, and directed the activities out of which the accident arose.

Roosth & Genecov Production Company v. White (Tex. Sup. Ct., 1953), 262 S. W. 2d 99, involved a defendant who supplied defective equipment and was in charge of and directed the operations out of which accident occurred. Here, Southeastern Drilling Company, not Respondent, furnished the defective equipment and directed the operations out of which accident occurred.

In *Smith v. Henger (Tex. Sup. Ct., 1950), 226 S. W. 2d 425*, the defendant had control of the premises involved and the operations thereon. Here, Southeastern Drilling Company, and not Respondent, had possession and control of the premises involved and operations thereon.

Neady v. The Magnolia Petroleum Company (Tex. Civ. App., 1938), 121 S. W. 2d 425, holds only that the death statute of the State in which death occurs determines who may have a cause of action for such death. The case has nothing to do with the situation when it is presumed by all concerned that the common law of the State of accident is the same as the common law of the forum in the absence of pleading and proof or the exercise by the trial court of judicial notice of the law of the foreign State.

Texas Electric Service Company v. Holt (Tex. Civ. App., 1952), 249 S. W. 2d 664, error ref., n.r.e., involved an affirmative act of alleged negligence on the part of defend-

ant. There is no suggestion in this case that Respondent was actively or affirmatively negligent in any manner.

Wright v. Tudor City Twelfth Unit, Inc., et al., 12 N. E. 2d 307, involved a defendant in possession of the premises of accident and an injured person who was a member of the general public, and not an employee of an independent contractor employed to do the work out of which the accident arose, as in this case.

In *Phillips Petroleum Company v. Gibson, 232 F. 2d 13, 1 L. Ed. 2d 71*, the defendant owned and furnished the barrel that exploded. Here, Southeastern Drilling Company owned and furnished the defective equipment.

Johnson v. Nicholson (Calif. Ct. of App., 1958), 324 Pac. 2d 307, imposes the duty of care upon the general contractor in control of the premises and the work there being done, and is much like *Smith v. Henger (Tex. Sup. Ct., 1950), 226 S. W. 2d 425*, discussed above. In this case that duty devolved upon Southeastern Drilling Company and not Gulf, since it was Southeastern Drilling Company who had possession and control of the premises and the work there being done.

The holding in *Halecki v. United New York & New Jersey S. H. P. Ass'n. (C. A. 2, 1958), 251 F. 2d 708*, purports to be a restatement of *Section 344* of the *Restatement of Torts* and can have no applicability to this case for the reason that the duties of that Section are imposed upon a possessor of premises and is owed only to those who come upon the premises as his patrons. In this case, Southeastern

Drilling Company, and not Gulf, was in possession of the premises involved. Additionally, Petitioner was not a patron coming on the premises for the purpose for which the place was open to the public. See *Comment a to Section 344* of the *Restatement of Torts.*

The Court of Appeals Did Not Rule that the Trial Court Erred in Its Instructions to the Jury

In his ninth question presented (pp. 4-11 of the Petition), Petitioner says "the Fifth Circuit held in the opinion that error was committed in the manner in which the trial court submitted the case to the jury." The opinion discusses the fact that the jury was given the case with instructions that made verdict for the plaintiff practically impossible, it is true (pp. 31-32 of the Petition), but that is not to say that the Court of Appeals held the instructions given to be erroneous. In fact, the Court of Appeals itself concluded as a matter of law that the jury could not properly hold Respondent liable to Petitioner in this case (p. 33 of the Petition).

Petitioner's Rights Under the Seventh Amendment of the Constitution Have Not Been Violated

Petitioner's case has been decided against him by jury verdict. His claim before the court is actually that the jury verdict against him and his claim should be set aside.

It is to be noted that Petitioner has not pointed out in any manner wherein he was denied his constitutional right to trial by jury. Nevertheless, Respondent will show this

court that there is no merit in this contention, even without regard to the fact that the Petitioner's case was submitted to the jury, and the jury by its verdict acquitted Respondent.

The rulings of both the trial court and the Court of Appeals were on lack of existence of duties owing by Respondent to Petitioner that were alleged to be breached or that might have been breached in this case. Clearly, no attempt has been made by the courts in this case to determine whether there was or was not, in fact, a breach of existing duties, or whether any such breach was a cause or could have been a cause of accident.

Of course, an indispensable element of actual negligence is the existence of a duty that has been breached. *Northern R. Co. v. Page, 274 U. S. 65, 71 L. Ed. 929; 38 Am. Jur. 651, 652.*

Certainly, the determination of the existence or non-existence of claimed duties on which to predicate claims of negligent breach is for the courts to decide, and not for the juries to determine as matters of fact. *City of Bryan v. Jenkins (Tex. Civ. App., 1952), 247 S. W. 2d 925, error ref., n.r.e.; New York & Porto Rico SS Co. v. Guanica Centrale (C. C. A. N. Y., 1916), 231 Fed. 820; Fuller v. Citizens Nat'l. Bank (C. C. Ohio, 1882), 15 Fed. 875; 65 C. J. S., Negligence, Sec. 287, p. 1233; 30-B Tex. Jur. 175-177.*

Inasmuch as there is a total lack of any legal duty owed by Respondent to Petitioner that has been shown or cor-

rectly suggested to exist, there was really nothing to submit to the jury. See *Tompkins v. Erie R. Co. (C. C. A. 2, 1938), 98 Fed. 2d 49, cert. denied, 305 U. S. 637, 83 L. Ed. 410, rehearing denied, 305 U. S. 673, 83 L. Ed. 436.*

Respondent in this case has shown that it was entitled to a directed verdict which clearly does not violate the Seventh Amendment to the Constitution, though it does deny jury verdict. See *Galloway v. United States, 319 U. S. 379, 394, 87 L. Ed. 1458.*

CONCLUSION

The courts below have properly handled and properly disposed of this case. Accordingly, it is respectfully prayed that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of the foregoing were deposited in the United States mail at Midland, Texas, each in properly stamped envelopes addressed to respective counsel for Petitioner, viz.: John J. Watts, Esq., at his post office address, P. O. Box 1031, Odessa, Texas; C. Melvin Neal, Esq., at his post office address, P. O. Box 1326, Hobbs, New Mexico; W. D. Girand, Esq., at Hobbs, New Mexico, and Warren E. Miller, Esq., Suite 1012, Barr Building, 910 Seventeenth Street N.W., Washington 6, D. C., this the day of August, 1958.

THIS I CERTIFY:

WILLIAM L. KERR,
211 First National Bank
Building,
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Counsel for Respondent.